Status of the 22 State Ozone Transport Rule Litigation and Implications for Technology Deployment

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Summary:

Litigation over the OTAG rule is becoming one of the most complex Clean Air Act issues in history, with profound implications for many coal combustion and pollution control technologies. EPA wants about an 80% average NOx reduction, while the states have proposed 55 to 65%. The difference between the parties may well be equal to that between SCR and SNCR, as well as to the viability of some clean coal technologies or not. EPA wants a 2003 compliance deadline. The states argue that it is technically unfeasible to design, procure, construct and perfect the technology, and that the rush to build so much so fast will jeopardize electric power reliability. Slipping the deadline changes the window of opportunity for emerging technologies. The possibility of slippage affects investment decisions by manufacturers and utilities.

The complexity derives firstly from the state versus federal nature of the case. The states, led by Michigan, are threatening to dissolve the state-federal partnership that underlies Clean Air Act enforcement. EPA is threatening a federal takeover of any state that balks. An EPA takeover will probably facilitate emissions trading, which expands technology choices. But EPA is also threatening to require controls on a plant by plant basis in response to Section 126 petitions from the affected Northeastern states. Such mandates could, probably would, limit technology choices. Finally, EPA has left open the option of expanding the control region to the entire 36 state OTAG region. This would necessitate a new rule making, under which the present rule might be stayed or remanded by the Court, or reproposed by EPA.

The broad array of opponents to the rule further complicates the case. The fact that the United Mine Workers and National Mining Association have joined the utilities in opposition, along with the states, makes this a case like no other before. Normally the Court does not stay a Clean Air Act action during litigation, nor remand a rule on scientific grounds. Either of these extreme actions is a possibility in this case. A stay is possible because of the high stakes, especially the threat to the state-federal relationship. A remand is possible because the Midwestern and Southern states, which were Ozone Transport Assessment Group members, argue that the OTAG scientific findings do not support EPA's final decision.

As if this were not enough, the Clean Air Act is coming up for reauthorization, raising the prospect of intervention in the case by Congress.The uncertainty and complexity of the alternatives is such that technological decision making is almost certain to be chaotic. It may even be panic stricken.This is likely to favor large manufacturers who have the resources to take large risks and lose large bets. It may also favor innovation in technology, but even that is not certain. Confusion tends to produce paralysis in large organizations.

The Court would prefer a settlement of course. Since I have nothing to lose, I can bet freely. My bet is that EPA will slip the deadline to 2006 or so, but will not increase the budgets. It will not try to control the outlying OTAG states. The in lying states will go along, and it will be over. But remember that if there are 5 equally likely bets there is only a 20% chance any one of them is correct. This is true for the technologies as well. Sorry I don't have better news. As an engineer I find the situation deplorable.